

8 Jan 14 2009SB 93**Testimony of Montana Association of Realtors (MAR)****House Natural Resources Committee****61st Session of the Montana Legislature****OPPONENT OF Senate Bill No. 93**

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING REQUIREMENTS FOR GROUND WATER APPROPRIATION IN CLOSED BASINS; REQUIRING MITIGATION FOR NET DEPLETION TO SURFACE WATER; AMENDING SECTIONS 75-5-410, 85-2-360, 85-2-362, AND 85-2-370, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Dear Chairman Gebhardt and members of the Committee:

For the record, my name is Abigail St. Lawrence, and I represent the Montana Association of Realtors ("MAR"). MAR represents over 4,600 real estate brokers, property managers, salespersons, and affiliates throughout Montana and is the business advocate for Montana real estate professionals, representing practitioners active in all phases of real estate brokerage, management, development, and appraisal. MAR opposes Senate Bill ("SB") 93 for the following reasons.

- When House Bill ("HB") 831, codified in part at Mont. Code Ann. § 85-2-360, was adopted last session, the sponsor, Rep. McNutt was very careful to include two key provisions: (1) adverse effect was distinguished from net depletion and (2) detailed requirements for a hydrogeologic assessment so as to limit agency discretion and provide clear and consistent guidelines to applicants. In insisting that adverse effect be distinguished from net depletion, HB 831 recognized what science has verified and what any appropriator will tell you—calculable depletion does not necessarily or even usually equate to adverse effect (*i.e.*, the inability of a prior

appropriator to reasonably exercise water rights). SB 93 does away with this key distinction, grounded in science, that made HB 831 workable.

- The Environmental Quality Council found that “[t]he measurement of adverse effect, as provided in the prior appropriation doctrine, is an important element in determining whether a new appropriation may be allowed by the DNRC.”¹ SB 93 disregards some of the basic principles of the prior appropriation doctrine that governs appropriation of water for beneficial use in Montana. In fact, SB 93 is at odds with numerous Montana Department of Natural Resources and Conservation (“DNRC”) administrative decisions, case law, and Mont. Code Ann. § 85-2-401 distinguishing changes in water conditions from adverse effect.² Mont. Code Ann. § 85-2-401(1) is very clear on what does and does not constitute adverse effect: “Priority of appropriation does not include the right to prevent changes by late appropriators in the condition of water occurrence, such as the increase or decrease of streamflow or the lowering of a water table, artesian pressure, or water level, if the prior appropriator can reasonably exercise the water right under the changed conditions.” Net depletion that can be calculated, but is not measurable, does not necessarily or even typically result in precluding prior appropriators from being able to divert and apply their water rights to beneficial use. SB 93 introduces a major policy shift, in contradiction to Mont. Code Ann. § 85-2-401(1), eliminating the recognition that changes in water conditions do not necessarily constitute adverse effects.
- By eliminating the distinction between adverse effect and net depletion, SB 93 would dramatically increase demand for water rights to be put to use in mitigation or aquifer recharge plans because any applicant for a new beneficial use permit in a closed basin would essentially be required to mitigate drop-for-drop. This

¹ Water Policy in Montana: A Report to the 60th Legislature of the State of Montana, p. 11 (Oct. 2006).

² See, e.g., In the Matter of the Application for Beneficial Water Use Permit No. 41255-g41B by A.W. Allred, Final Order, p. 3 (Sept. 4, 1986) (“The Objectors repeatedly point to evidence that Mr. Allred’s pumping will diminish the water supply. (Paragraphs 3, 5 Objections.) Mere diminution is, however, not in dispute. Whether that diminution will adversely affect any other right holder, is.”); In the Matter of the Application for Beneficial Water Use Permit No. 71925-41B by Ronald W. Johnson, Proposal for Decision, p. 18 (Dec. 4, 1990) (“Although groundwater and surface water are interconnected, both expert witnesses agree the loss of baseflow accretion to the Beaverhead River would be imperceptible. See, Finding of Fact 11. Mere diminution does not, in itself, create adverse effect. See, In re Application No. 33484-g40A by Hunt.”).

increased demand for mitigation water would accelerate Montana's developing water market with surface water rights being sold off to the highest bidders for mitigation, which, in turn, would severely impact the ability to develop affordable housing in closed basins, which are typically areas of high growth that already have a demonstrated need for workforce housing. A side effect of this accelerated water market, not to be taken lightly, is the very real possibility of large parcels of primarily agricultural property left without water rights and, therefore, essentially valueless as existing water rights holders, attracted by the possibility of a high price for their water rights, sell off water rights for mitigation use.

- SB 93 assumes that new groundwater appropriations and groundwater development in closed basins will result in the depletion of surface water and adverse effect on senior appropriators, an assumption that has not played out in the studies of groundwater availability that have been undertaken. Studies completed by the Montana Bureau of Mines and Geology of the Lower Beaverhead, the Gallatin Valley, and the Bitterroot Watershed, as well as studies of the Gallatin and Bitterroot watersheds and the high-growth areas of Lewis and Clark and Missoula Counties commissioned by MAR, found that, for the basins investigated, stream depletion resulting from new appropriations has not produced measurable impacts on a basin-wide scale to base streamflows or groundwater storage.³ Contrary to anecdotal conclusions, the available scientific data does not support a conclusion that any new appropriation of groundwater, even in closed basins, results in adverse effect to existing surface water users.

The bottom line is that SB 93 proposes a major policy shift away from a policy that HB 831 last session was so careful to include. SB 93's assumption that net depletion always equates to adverse effect is not supported by the available scientific data available and is contrary to

³ See, Montana Bureau of Mines and Geology, Preliminary Draft Case Study Report to the 60th Legislature Water Policy Interim Committee, pp. 67-69, 89, 102 (June 10, 2008). See also, Nicklin Earth & Water, Water Resources Evaluation: Water Rights in Closed Basins (June 2008).

Montana law and well-articulated case law as set forth in DNRC hearing decisions. Please recommend a “do not pass” on Senate Bill No. 93. Thank you, and I will be available for any questions.